

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Federal-State Joint Board on Universal Service)	
)	CC Docket No. 96-45
Western Wireless Corporation Petition for Waiver)	
of Section 54.314(d) of the Commission's Rules)	

**Opposition of the
South Dakota Telecommunications Association**

The South Dakota Telecommunications Association ("SDTA") hereby opposes the "Western Wireless Petition For Waiver Of Section 54.314(D) Of The Commission's Rules," which was filed in this proceeding on or about March 13, 2003. Contrary to the claims of Western Wireless Corporation ("WWC"), its Section 54.314(a) certification was not delayed by "extraordinary proceedings" before the South Dakota Public Utilities Commission ("SDPUC"), nor do any other "special circumstances" or "good cause" support a waiver. Rather, the failure of Western Wireless to receive Section 54.314(a) certification from the SDPUC prior to the October 1, 2002 and January 1, 2003 deadlines for receiving support during the First and Second Quarters of 2003 was due entirely to WWC's own unexcused failures and delays in making the reasonable and competitively neutral filings with the SDPUC.

This opposition is submitted in accordance with the Commission's Public Notice (Wireless Competition Bureau Seeks Comment On Western Wireless Corporation's Petition For Waiver Of Section 54.314(D) Of The Commission's Rules), DA-1064, released April 2, 2003.

Background

Section 54.314(d)(1) of the Commission's Rules establishes the deadlines that are applicable to state certifications regarding the use of federal universal service support. Under the current provisions of 47 C.F.R. § 54.314(d), because this Commission did not receive from the SDPUC a certification regarding use of universal service support by WWC until mid-March of 2003, WWC

is ineligible to receive high-cost distributions from the federal universal service fund until July 1, 2003.¹ WWC seeks a waiver of this established deadline pursuant to the Commission's general authority under 47 C.F.R. § 1.3 to grant suspend, amend, or waive its rule provisions for "good cause." WWC contends that granting a waiver of the rule provisions found in Section 54.314(d) would be consistent with this Commission's past practice of granting a waiver "if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest."²

Argument

SDTA disputes the claim of WWC that there is good cause for granting its requested waiver and that granting such waiver would be consistent with the Commission's established precedent. There are no "special circumstances" present that warrant a waiver of the timelines for certification stated in 47 C.F.R. § 54.314(d) and granting such waiver would not be consistent with the "public interest" as WWC claims. To the contrary, granting the waiver would only serve to reward WWC for its own self-imposed delays and would make a mockery of the established

¹ See 47 C.F.R. § 54.314(d)(3) which provides: "(3) *Certifications filed on or before April 1.* Carriers for which certifications are filed on or before April 1 shall receive support pursuant to §§ 54.301, 54.305, and/or 54.307 and/or part 36, subpart F of this chapter, in the third and fourth quarters of that year. Such carriers shall not receive support pursuant to §§ 54.301, 54.305, and /or 54.307 and/or part 36, subpart F of this chapter in the first and second quarters of that year."

² In several cases, the Commission has clarified the "good cause" standard stated in 47 C.F.R. § 1.3, in the specific context of addressing waiver petitions relating to the provisions of 47 C.F.R. § 54.314(d). In a very recent decision the Commission offered the following comments concerning the applicable legal standard: "Generally, the Commission's rules may be waived for good cause shown. As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest." *Federal-State Joint Board on Universal Service; Guam Cellular and Paging, Inc. Petition for Waiver of Section 54.314 of the Commissions Rules and Regulations*, CC Docket No. 96-45, DA 03-1169, released April 17, 2003, par. 5 (hereinafter referenced as "*Guam Cellular*"). See also, *Federal-State Joint Board on Universal Service; RFB Cellular, Inc. Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations*, CC Docket No. 96-45, DA 02-3316, released December 4, 2002 (hereinafter referenced as *RFB Cellular*); and *Federal-State Joint Board on Universal Service; Connecticut Department of Public Utility Control Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Rural Carriers*, CC Docket No. 96-45, DA 02-3406, released December 11, 2002 (hereinafter referenced as *Connecticut Dept. of Public Utility Control*).

deadlines, which to this point have been followed with very few exceptions by all other eligible telecommunications carriers.

The Petition filed by WWC, generally, is based on the premise that WWC was prevented from obtaining the state certification required under Section 54.314 due to “extraordinary” or “inordinate” delays associated with state commission proceedings. The impression is given by WWC’s Petition, as a whole, that these delays were unavoidable and out of WWC’s control. There is one reference in the Petition to delays brought on “by carriers themselves,” but there are other statements that appear intended to give an impression of either inaction or slow action by the SDPUC. The statement is made on page 2 of the Petition that “[t]he requested waiver is appropriate due to the extraordinary delays in processing Western Wireless’ compliance filing and certification of Western Wireless’ proper use of high-cost support.” On page 6 of the Petition it is stated that the Commission’s rules “certainly do not contemplate the delays that were imposed by the extraordinary proceedings that Western Wireless underwent before the SDPUC.” SDTA objects to these statements as being inaccurate representations of the actual facts. WWC offers a portrayal of a company victimized by dilatory administrative proceedings and suggests injustice would result if its requested waiver is not granted. This representation of the circumstances strays far from the reality and SDTA urges this Commission to look carefully at what actually occurred in the South Dakota proceedings. What the Commission will find from its review is that any delay in the state proceedings leading to WWC’s request for a waiver of 47 C.F.R. § 54.314(d) can be attributed to WWC’s own actions or inaction. It is wrong for WWC to suggest that either the SDPUC or other parties forced the present circumstances, making it necessary for WWC to seek a rule waiver.

WWC complains of delays associated with two separate SDPUC proceedings: (1) the “compliance filing” proceeding which led to the SDPUC’s final order granting ETC designation to WWC in certain rural service areas in South Dakota; and (2) the SDPUC proceeding addressing

WWC's first request for state certification made pursuant to Section 54.314.³ WWC suggests that these SDPUC proceedings were not handled properly by the SDPUC and that as a result WWC was faced with extraordinary and unnecessary delays. SDTA disputes this version of the prior events. As further explained below, neither the SDPUC nor any other party is responsible for causing any delays that would warrant granting WWC a waiver from the established FCC rules. WWC brought the present circumstances upon itself and it should not be granted any special privilege or consideration that permits it to escape the consequences of its own actions or inaction.

A. SDPUC Proceeding on Compliance Filing

On October 18, 2001, the SDPUC issued an Order on remand from the South Dakota Supreme Court (*See Findings of Fact and Conclusions of Law; Notice of Entry of Order, TC98-146, attached as Appendix A*). As WWC has noted, this Order (hereinafter referenced as the "Public Interest Order") concluded that it was in the public interest to designate WWC as an ETC in certain rural service areas in South Dakota. The Order also required, however, as a condition to WWC receiving final ETC designation in the affected rural service areas that a subsequent filing be made with the SDPUC showing compliance with a number of conditions. A number of different conditions were imposed, which in part included (1) a requirement that WWC file with the SDPUC the service agreement that it would use in offering its universal service to customers; (2) a requirement that its service agreement be consistent with the SDPUC's service quality rules; (3) the filing of an advertising plan relating to its universal service offering and a list of local calling areas; and (4) the filing of information on how customers would apply for Lifeline discounts.

³ The "compliance filing" was required by the SDPUC as a condition to Western Wireless receiving final ETC designation in SDPUC Docket TC98-146, *See, In the Matter of the Filing of GCC License Corporation for Designation as an Eligible Telecommunications Carrier; Findings of Fact and Conclusions of Law; Notice of Entry of Order*, pp. 2, 5 and 6, issued October 18, 2001. Western Wireless' first request for certification made to the SDPUC under 47 C.F.R. § 54.314 was filed on September 11, 2002. This filing was docketed by the SDPUC as a separate proceeding, TC02-156, *Request of WWC License LLC for Certification Regarding its Use of Federal Universal Service Support*.

Although the *Public Interest Order* calling for WWC's compliance with these conditions was issued October 18, 2001, WWC made no filing with the SDPUC pursuant to such Order until August 29, 2002, almost a full year later. WWC has never offered any explanation as to why it waited this long to meet the conditions imposed by the SDPUC's *Public Interest Order*. No mention is made of this delay in the Petition filed in this case, yet very clearly the delay associated with this failure on WWC's part is much longer than the time spent by the SDPUC in reviewing and ruling on either WWC's compliance filing or its requests for state certification under Section 54.314 of the Commission rules. SDTA finds it unfathomable that WWC can complain of the delay brought on by the SDPUC proceedings when it did nothing for more than 10 months to respond to the SDPUC's *Public Interest Order*. How could it be declared in good conscience that WWC is deserving of a waiver under these circumstances? Very clearly, WWC is not currently receiving universal service support for any areas in South Dakota outside of the Pine Ridge Reservation because of its own failure to respond to the Commission in a timely manner. WWC should not be rewarded for or excused from its own failure to promptly meet the SDPUC's ETC conditions.

WWC in various ways attempts to shift the blame to the SDPUC for not receiving the necessary state certification regarding its use of universal service funding until March of 2003. On page 5 of its Petition, WWC states that it believed its compliance filing made with the Commission on August 29th would be effective upon its filing. WWC claims that this belief was consistent with "standard state commission practice." In response, SDTA questions how WWC arrived at this conclusion. There is nothing in either the South Dakota statutes or administrative rules indicating that the compliance filing would have been automatically approved and effective upon its filing. Moreover, the specific language of the *Public Interest Order*, in setting forth the conditions to be complied with, indicates that a SDPUC determination or determinations would have to be made concerning the compliance filing. More importantly, the Order states that

WWC's service agreement would have to be "consistent with the Commission's service quality rules." This wording presumes some official determination by the SDPUC at least in regards to WWC's filed service agreement.

Regarding the compliance filing process, SDTA also takes issue with the suggestion by WWC that the SDPUC took an excessive amount of time in reviewing and acting on the filing. Attached as Appendix B hereto is a copy of the SDPUC's final "*Order Designating Western Wireless as an ETC for Areas Served by Certain Rural Telephone Companies*," in Docket TC98-146. A review of this Order clearly indicates that the initial compliance filing made by WWC was not viewed as acceptable by the SDPUC and that revisions were made to the filing on more than one occasion. The compliance filing was first presented to the SDPUC on August 29, 2002. It was then reviewed at a SDPUC meeting on September 24, 2002, and based on the discussions at that meeting, WWC presented a revised compliance filing on October 11, 2002. At a SDPUC meeting on November 20, 2002, additional concerns regarding the compliance filing were noted by the SDPUC, including an inaccurate listing of eligibility criteria on the Lifeline form. A procedural schedule was then set to allow SDTA opportunity to comment on a second revised filing. WWC was directed by the SDPUC to submit a revised compliance filing by December 2, 2002. The SDPUC received the new revised compliance filing on December 2, 2002, and SDTA filed its comments regarding the same on December 12, 2002. At this point, WWC requested an extension of time of the established comment schedule to allow additional time for WWC to file reply comments. WWC asked that the date for its reply comments be changed from December 17, 2002 to January 3, 2003. The SDPUC determined, however, in addressing the request for an extension that it should grant a shorter extension for the reply comments. The timeline for WWC's reply comments was extended to December 27, 2002.

In addition, it should be noted that the SDPUC was prevented from addressing WWC's compliance filing at any time prior to the SDPUC meeting on September 24, 2002, because of

WWC's failure to timely respond to a SDPUC Staff data request.⁴ SDPUC Staff issued a data request to WWC regarding its compliance filing, but WWC did not provide a response to this request until September 24, the day of the SDPUC meeting.

The foregoing procedural history surrounding the compliance filing makes it crystal clear that there is no "good cause" to grant WWC's waiver request. WWC claims delay on the part of the SDPUC, yet it is WWC that requested an extension of time in the compliance filing proceeding and it is the SDPUC that shortened the requested extension period in order to make the way for a speedier determination on such filing.

WWC caused delay in approval of its compliance filing in four ways, by: (1) not responding to the SDPUC's *Public Interest Order* and not making a compliance filing for over 10 months after issuance of the *Public Interest Order*; (2) filing documents with the SDPUC that did not sufficiently indicate compliance with the conditions imposed by the SDPUC on its ETC designation; (3) not timely responding to a SDPUC data request; and (4) requesting an extension of the SDPUC procedural schedule that was established to address the compliance filing. These facts clearly demonstrate the extent to which WWC is responsible for its current predicament and they cannot fairly be ignored in this process, in addressing WWC's request for a waiver.

B. SDPUC Proceedings on State Certification Requests

WWC also attributes delay to the SDPUC proceeding addressing its first request for certification, which was filed with the SDPUC on September 11, 2002. This first request was denied by the SDPUC by "*Order Denying Certification*" issued on September 27 (see Appendix C attached). The SDPUC denied the request for two reasons: (1) the SDPUC was unable to certify WWC for high-cost support because at that time the WWC compliance filing was still pending and, accordingly, WWC was not yet an ETC in the affected rural service areas; and (2) WWC did

⁴ See *In the Matter of the Request of WWC License LLC for Certification Regarding its Use of Federal Universal Service Support; Order Denying Certification*, dated September 27, 2002, pp. 1 and 2, Docket TC02-156 (attached hereto as Appendix C).

not present as part of its request for state certification an estimate of its federal universal service amounts for 2003 and an estimate of its expenditures for the provision, maintenance, and upgrading of facilities and services during that same year.

Both of these reasons cited in support of the SDPUC's denial of the request for certification relate to events within WWC'S control and, therefore, any delay resulting from such denial should be attributed to no one other than WWC. First, regarding the SDPUC's inability to provide the certification due to the pending compliance filing, it was WWC's decision to wait with its compliance filing until August 29, 2002, and it was this decision that made it impossible for the SDPUC to grant the first requested certification. As noted specifically in the SDPUC's Order, "Western Wireless could have avoided any delay in receiving certification if it had filed its compliance filing in a timely manner, and answered Staff's data request in a timely manner. Instead, WWC waited for almost one year to submit its compliance filing and then failed to promptly respond to Staff's questions in a manner that would have enabled Staff, as well as the Commission, to review any changes to its compliance filing. The Commission was then required to defer action on the compliance filing in Docket TC98-146." *Emphasis added.* (Appendix C, p. 2).

The second reason set forth by the SDPUC for denying WWC's first request for certification under Section 54.314 is also tied to action or inaction by WWC. In 2001, the SDPUC started requiring from all ETCs as part of the Section 54.314 certification process specific financial information relating to anticipated universal service revenues and anticipated expenditures and investments associated with providing universal service. At the time that WWC presented its first request for certification to the SDPUC in September of 2002, it should have been aware of the established SDPUC requirements and, accordingly, should have presented a request in conformance with these requirements. Instead, WWC presented a request for

certification that was grossly deficient in presenting financial information. The only thing presented was a 2001 press release containing only 2001 investment data.

WWC did not obtain the state certification required under this Commission's rules until just recently, on March 7, 2003, due to its own delays and its failure to present the SDPUC with sufficient information supporting its filings. All of the foregoing facts speak loudly against granting the waiver requested in this case. It should further be noted that WWC was not even timely with its second request for state certification filed with the SDPUC. WWC received approval of its compliance filing from the SDPUC on January 6, 2003. The company did not, however, present its second request for certification under 47 C.F.R. § 54.314 until January 31, 2003. This is another instance of delay by WWC, giving even further justification for a denial of the waiver request.

C. Established Precedent Regarding Waivers of Section 54.314(d).

WWC contends that granting it a waiver of 47 C.F.R. § 54.314(d) in this case is consistent with established Commission precedent. The recent *RFB Cellular Case* decided by the Commission is cited and WWC goes so far as to state that the circumstances in that case are "virtually identical to this one." (WWC Petition, p. 7). SDTA objects to this statement. There is no indication in the *RFB Cellular* decision that the petitioning party was responsible for any delay in the underlying proceedings leading up to the waiver request. The same goes for the other decisions released by this Commission, to date, granting waivers of the Section 54.314 provisions – *Guam Cellular* and *Connecticut Dept. of Public Utility Control*.

In addition, it should be noted that WWC is actually requesting in this case a waiver of the rules, which effectively would permit it to start receiving federal universal service funding beginning January 1, 2003. This also makes the circumstances of its waiver request different from those presented in the other cases. WWC did not obtain final ETC designation from the SDPUC

until January 6, 2003.⁵ The WWC request in this case, therefore, seeks universal service funding for a period of time that actually commenced before it received legal ETC status. WWC, in seeking support back to January 1, 2003, is seeking a determination from this Commission that is not appropriate under federal law.

Conclusion

In sum, it would not be consistent with this Commission's past decisions to grant the waiver requested by WWC. SDTA urges the Commission to consider the actual circumstances presented in the underlying SDPUC proceedings. A review of these circumstances shows very clearly that WWC itself caused the delays that have led to its request for a waiver of the Commission rules. WWC attempts to shift the blame to others, but this ignores the facts. To grant the requested waiver under the circumstances presented would reward WWC for its own delay and seriously discredit the current deadlines established in Section 54.314(d) as well as the waiver process set forth in Section 1.3 of the Commission's rules. It would establish very poor precedent for addressing future waiver requests and would make it difficult for this Commission in the future to deny waiver requests for any reason. If a waiver is granted in the case at hand, it is hard to comprehend any circumstances where it should not be granted. SDTA strongly urges this Commission to reject the WWC Petition.

Respectfully submitted,
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⁵ See *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier; Order Designating Western Wireless as an ETC for Areas Served by Certain Rural Telephone Companies*, Docket TC 98-146.